IN THE SUPREME COURT OF MISSOURI

Case No. SC 85276

PURLER-CANNON-SCHULTE, INC. and KARSTEN EQUIPMENT CO.,

Appellants,

v.

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS and CITY OF ST. CHARLES,

Respondents

APPEAL FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY THE HONORABLE NANCY L. SCHNEIDER, DIVISION NO. 2

BRIEF OF AMICI CURIAE MISSOURI RURAL WATER ASSOCIATION, MISSOURI MUNICIPAL LEAGUE, AND CITY OF SPRINGFIELD

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JURISDICTIONAL STATEMENT

Amici Curiae Missouri Rural Water Association, Missouri Municipal League, and City of Springfield, Missouri, hereby adopt and incorporate by reference as if fully set out herein the jurisdictional statement contained in the brief of Appellants Purler-Cannon-Shulte, Inc. and Karsten Equipment Co.

INTEREST OF AMICI CURIAE

The Missouri Rural Water Association is an association of seven hundred and twenty-eight public water districts and other public entities that contract for and undertake public works projects involving outdoor pressurized pipe for the provision of public utility services. Some of its members are located within and undertake Outdoor Pipe Projects within the Subject Counties, including members located in St. Charles County and surrounding counties. The Association=s members serve over 626,000 water connections. Installation and repair of these connections are public works projects subject to the Prevailing Wage Act requirements as enforced by the Department.

The Missouri Municipal League is an association of 618 municipalities in the State of Missouri, including numerous cities that contract for and undertake public works projects involving outdoor pressurized pipe for the provision of public

utility services. The Municipal League provides a vehicle for cooperation in formulating and promoting municipal policy at all levels of government to enhance the welfare and common interests of municipalities' citizens.

The City of Springfield is a constitutional charter city that, independently and through its Public Utilities Board, contracts for and undertakes public works projects involving outdoor pressurized pipe for the provision of public utility services, including pressurized gas, water, and sewer lines used to provide basic utility services to the public.

The Amici, or its members, are all political subdivisions of the State of Missouri subject to the Prevailing Wage Act and the Department:s occupational titles and wage rates and required to pay prevailing wages on public projects. Amici believe that the Court's decision in this case could have a serious impact on cost and ability to undertake public works: projects. The consequences of that impact will be higher rates for water users of Amici; it will restrict the ability of Amici to extend water service to unserved areas. If the circuit court decision is affirmed it will permit privately

owned water companies to construct waterlines at substantially less expense than public entities, thereby discriminating against the thousands of water users served by public entities because higher construction costs ultimately translate into higher water rates for those served. If this is permitted in this case it will soon affect public entities statewide.

To illustrate, when water systems or extensions thereto are constructed by public water supply districts the financing is often by loans and grants of a fixed amount. In many cases the number of people that can be served is determined by the amount of money available. Increased costs of labor on waterline construction of 42% will substantially reduce the amount of water line that can be constructed, which means fewer persons can be served in areas now without water service. The proposed rule of the Missouri Department of Labor will cause much hardship, especially in rural areas. The significant public interests of Amici and their local government members are not fully represented by the contractor parties to the case. Therefore, while Amici fully support the Points Relied On as presented by Appellants, Amici

respectfully submit this additional discussion and argument.

Consent of Parties for Filing of Amicus Curiae Brief

Pursuant to Rule 84.05(f)(2), V.A.M.R., the undersigned counsel for Amici has contacted counsel for the Appellant and the Respondents, all of whom have expressed their consent on behalf of their parties to the filing of this amicus curiae brief.

STATEMENT OF FACTS

Amicus Curiae Missouri Rural Water Association, Missouri Municipal League, and City of Springfield adopt and incorporate by reference as if fully set out herein the statement of facts contained in the brief of Appellants Purler-Cannon-Shulte, Inc. and Karsten Equipment Co.

POINTS RELIED ON

I. THE CIRCUIT COURT CLEARLY ERRED IN GRANTING SUMMARY JUDGMENT HOLDING THAT ART X '21 OF THE MISSOURI CONSTITUTION IS NOT VIOLATED IN THAT THE TRIAL COURT BASED ITS DECISION ON THE ERRONEOUS CONCLUSION THAT A POLITICAL SUBDIVISION ACOULD AVOID THE INCREASED COSTS@ IMPOSED BY THE STATE BY ACHOOSING NOT TO GO THROUGH WITH@ THE ACTIVITY BECAUSE THIS REASONING WAS EXPRESSLY REJECTED IN *MISSOURI MUNICIPAL LEAGUE V. STATE OF MISSOURI.*

Missouri Municipal League v. State of Missouri, 932 S.W.2d 400, 402-03 (Mo. banc 1996)

Missouri Municipal League v. Brunner, 740 S.W.2d 957 (Mo. banc 1987)

City of Jefferson v. Dept. of Natural Resources, 916 S.W.2d 794 (Mo. banc 1996)

Boone County Court v. State, 631 S.W.2d 321 (Mo. banc 1982)

State ex inf. Webster ex rel. Division of Labor Standards v. City of Camdenton, 779 S.W.2d 312, 316 (Mo.App. 1989)

Essex Contracting, Inc. v. City of DeSoto, 815 S.W.2d 135, 139 (Mo. App. E.D. (1991)

MO CONST Art. 10, Section 21

Section 290.340, RSMo

Section 537.600, RSMo

II THE CIRCUIT COURT ERRED IN UPHOLDING THE DEPARTMENT=S IMPOSITION OF PIPEFITTER WAGES TO WORK THAT IS ACTUALLY PERFORMED IN THE LOCALITIES AT THE GENERAL LABORER PREVAILING WAGE IN THAT IT UNLAWFULLY INCREASES THE COSTS TO LOCAL GOVERMENTS AND TAXPAYERS IN VIOLATION OF THE REQUIREMENTS OF THE ACT AND PRIOR APPLICATION OF THE ACT.

Essex Contracting, Inc. v. City of DeSoto, 815 S.W. 2d 135, 138 (MO App. E.D. (1991)

City of Joplin v. Industrial Commission of Mo. 329 S.W.2d 687 (Mo. 1959)

MO CONST Art. 10, Section 21

ARGUMENT

Introduction

Amici Missouri Rural Water Association, Missouri Municipal League, and City of Springfield file this Brief of Amici Curiae because the trial court=s judgment unlawfully endorses the actions of the Department of Labor and Industrial Relations (ADepartment@) in imposing the higher prevailing wage rate for Pipe Fitters on work that has always been paid the prevailing wage rate for General Laborer. The Department=s action is a departure from the fundamental premise of the Prevailing Wage Act that local governments and their contractors are required to pay the A*actual*@ wage paid in the locality in which the public works project is being performed to workmen engaged in work of a similar character. '290.210 RSMo.

The Department, which ascertains the prevailing wage rates paid in each locality is now using its Occupational Title Rule (8 C.S.R. ' 30-3.010 *et seq.*), to unconstitutionally require political subdivisions and their contractors to pay higher "Pipe Fitter" wages for work that historically had been lawfully paid at lower "General Laborer" wages. Its enforcement is not based on any evidence that Pipe Fitter wages are actually paid for such work in any locality, but rather on the Department=s own determination of what should be paid despite the actual practices in each locality. In a nutshell, the Department has decided that outdoor public pipe projects should be paid at the same rates as plumbers and pipefitters doing primarily indoor building work even though the actual wage paid for such work in the applicable localities (and throughout Missouri) is the General Laborer rate.

This enforcement changes the actual wage practice and applicable law in effect as of 1981 and before, and therefore violates the Article X, Section 21 of the Missouri Constitution (Athe Hancock Amendment@) by forcing political subdivisions to pay a significantly higher wage for exactly the same work that

private contractors in the local marketplace continue to pay at the lower Laborer wages. This unlawful increase in the wage classification is also contrary to the actual wages paid in the locality and therefore also violates the Prevailing Wage Act by directly increasing the costs of pressurized pipe projects to public entities, their taxpayers and water users, in disregard to the actual wage rate paid in the locality for such work.

The circuit court=s decision in favor of the Department is directly contrary to prior decisions of this Court and the Court of Appeals and should be reversed. *See, e.g., Missouri Municipal League v. State of Missouri*, 932 S.W.2d 400, 402-03 (Mo. banc 1996); *Essex Contracting, Inc. v. City of DeSoto*, 815 S.W.2d 135, 139 (Mo. App. E.D. (1991).

I. THE CIRCUIT COURT CLEARLY ERRED IN GRANTING SUMMARY JUDGMENT HOLDING THAT ART. X, '21 OF THE MISSOURI CONSTITUTION IS NOT VIOLATED IN THAT THE TRIAL COURT BASED ITS DECISION ON THE ERRONEOUS CONCLUSION THAT A POLITICAL SUBDIVISION ACOULD AVOID THE INCREASED COSTS@ IMPOSED BY THE STATE BY ACHOOSING NOT TO GO THROUGH WITH@ THE ACTIVITY BECAUSE THIS REASONING

WAS EXPRESSLY REJECTED IN *MISSOURI MUNICIPAL LEAGUE V. STATE OF MISSOURI.*

The following erroneous conclusion of the trial court exposes the fundamental flaw in the reasoning supporting the judgment:

> Because a political subdivision could avoid the increased costs by choosing not to go through with a contemplated construction project, or by using its own employees to perform the desired work, the state is not mandating that a political subdivision engage in the activity whose costs have increased.

This Court has expressly and implicitly rejected this argument on multiple occasions. *Missouri Municipal League v. State of Missouri*, 932 S.W.2d 400, 402-3 (Mo. banc 1996); *Missouri Municipal League v. Brunner*, 740 S.W.2d 957 (Mo. banc 1987). When, for example, the state argued that a state-imposed increase in water testing charges was not a mandate because Aproviding water@ service is Aa discretionary activity@ Anot required of a political subdivision,@ this Court disagreed, and in rejecting a lower court ruling, held that:

> Upholding the governmental/proprietary distinction allows the state to characterize many activities of municipalities as Aproprietary,@ thus, not Arequired of a political subdivision.@ The distinction allows the government to thwart the purpose of the Hancock Amendment. Once the state imposes a requirement on a political subdivision, it makes no difference whether the underlying service is one traditionally performed by the government.

Missouri Municipal League v. State, 932 S.W.2d at 402-3.

Based on the reasoning of this Court=s prior holdings, the Arequired@ activity here is not the *undertaking* of *public works projects*--it is *compliance* with the Prevailing Wage Act. To be sure, a political subdivisions= compliance is not optional. Since 1957, compliance with the Prevailing Wage Act has been a condition of all public works projects undertaken by political subdivisions, and failure of any public Aofficer@ or Aofficial@ to comply with the Act is punishable as a criminal offense. *See* RSMo. ' 290.340.

Any change to the Act=s requirements, therefore, that

imposes unfunded increased costs on political subdivisions is therefore a change in a Arequirement@ of the state that violates the Hancock Amendment. *See Missouri Municipal League v. State of Missouri*, 932 S.W.2d 400, 402-03 (Mo. banc 1996) and *City of Jefferson v. Dept. of Natural Resources*, 916 S.W.2d 794 (Mo. banc 1996) (City challenged a state law requiring cities that were not members of a waste management district to submit a new or revised solid waste plan in compliance with the state law; Court found that the increase in costs for compliance **B** need to hire additional staff and increased administrative costs **B** was more than de minimis). Thus, because political subdivisions *are* required to comply with the Prevailing Wage Act, whether they are required by law to undertake or contract for public works projects is irrelevant to this analysis. And, because compliance with the Prevailing Wage Act is a required activity, any unfunded increase in the cost of that activity violates the Hancock Amendment even where the underlying activity is not required. *Id.* Given this Court=s prior rulings, there is little question that an increased wage or similar monetary cost required of local governments is clearly a type of required

Aactivity@ that the Legislature may not mandate on local governments without corresponding revenue to pay for such increase. *Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982) (Hancock violated by increased salary requirement); *Missouri Municipal League v. State*, 932 S.W.2d 400 (Mo. banc 1996)(Hancock violated by increase fee requirement).

Moreover, as implicitly recognized by this Court in *Missouri Municipal League*, it is a legal fallacy that a given political subdivision can simply choose *not to perform* public works projects or elect to have them constructed by its employees. For example, if a city has a sewer or water line break, it must take immediate action that may involve work subject to the prevailing wage, that city simply cannot avoid a pipe project under the disingenuous argument of the State that such projects are simply of the governments= choosing. Beyond basic public safety, such projects may be necessary as a part of its affirmative, statutorily-imposed, duty to keep public property in a reasonably safe condition. *See*, '537.600 RSMo. Similarly, not every political subdivision has the luxury of Ausing its own employees to perform the desired work@ as the

trial court concluded. If, for example a rural water district has one, part-time, clerical employee, it simply *has no choice* but to contract for all public works projects that it is obligated to undertake. The state, like a political subdivision, cannot Athwart@ the requirements of the prevailing wage law by legal legerdemain. *Missouri Municipal League*, 932 S.W.2d at 403; *State ex inf. Webster ex rel. Division of Labor Standards v. City of Camdenton*, 779 S.W.2d 312, 316 (Mo.App.1989) (rejecting attempt to claim that workmen were not performing work "on behalf" of the public body, the court stated that a Apublic body constructing public works may not circumvent the prevailing wage law by a 'carefully constructed legal façade.'").

Like increased water testing fees, the increased costs for outdoor pipe public works projects produced by the Department=s unauthorized change in enforcement and interpretation of the Prevailing Wage Act to require a different, higher wage to be paid is void under the provisions of Article X, Section 21 of the Missouri Constitution. The trial court is incorrect in its finding that the evidence does not show that Athe Department has

changed it position.@ LF 791. The change imposed is patent. As the trial court held[1], the laborer wage, not pipe fitter, was judicially determined to be the actual wage required to be paid on outdoor pipe projects. *See Essex Contracting, Inc. v. City of DeSoto*, 815 S.W.2d 135, 139 (Mo. App. E.D. (1991). The Department does not claim that its enforcement now (expressly held unlawful in *Essex*) is because of anything other than its own change implemented by the Occupational Title Rule.

The Hancock Amendment provides no protection at all to local governments and their taxpayers if the state can simply shift regulatory costs to local governments and then rely on the defense that the cities can simply stop providing the affected government services to avoid the costs. Clearly this was the holding of this Court in *Missouri Municipal League, Supra*, and the trial court=s judgment should be reversed. The unilateral imposition of an increased prevailing wage rate is no different than the unilateral imposition of an increased salary struck down by this Court in *Boone County*. There is no dispute that these costs are borne directly by the local

[1] The trial court agreed that *Essex* determined Athat the wage rate typically paid to Laborers set the prevailing wage rate for the occupational classification of Pipe Fitter.@ LF 791.

governments or that compliance by the local government is a statutory mandate.

Similarly, the trial court=s Adistinction@ that prevailing wages are not Adirectly@ paid by the local governments, but by their contractors (LF 792), is based on an impermissible Alegal façade.@ Local governments= contracts based on Atime and material@ costs are, as a matter of law, a Adirect@ payment of the increased wage, subject to criminal penalties if the officers fail to do so. Moreover, the undisputed evidence in this case **B** and the undeniable fact conceded by the Department **B** is that when the prevailing wage is increased **B** Aall else being equal@ **B** the cost to the local government is unequivocally and unilaterally increased to the public entity without any corresponding revenue to pay for such mandate. As a result, sewers will not be built, water lines will not be extended, and taxpayers will simply be denied basic utilities to the extent funds have not been expended on increased wage rates. It is exactly these type of public harms caused by unilateral state action that the Hancock Amendment prohibits.

The fact that all such increases are only indirectly passed

to the taxpayer is simply not a defense to violation of the Hancock prohibition.

Regardless of the intent of the Department in crafting its Rule, an agency may not rely on its own creation as authority to violate the Constitutional prohibitions. Accordingly, the Department may not apply its Rule in such a way as to change the wage rate that had always been lawfully paid and thereby substantially increase the cost to taxpayers of public works projects.

II. THE CIRCUIT COURT ERRED IN UPHOLDING THE DEPARTMENT=S IMPOSITION OF PIPEFITTER WAGES TO WORK THAT IS ACTUALLY PERFORMED IN THE LOCALITIES AT THE GENERAL LABORER PREVAILING WAGE IN THAT IT UNLAWFULLY INCREASES THE COSTS TO LOCAL GOVERNMENTS AND TAXPAYERS IN VIOLATION OF THE REQUIREMENTS OF THE ACT AND PRIOR APPLICATION OF THE ACT.

Public entities are directly and adversely affected by the trial court=s upholding of the Department=s actions. The evidence before the trial court admitted by the Department showed that wages on a public works project are increased 42% on average by the requirement of Pipe Fitter wages where General Laborers wages had traditionally been paid, and are still generally paid in the private sector. The Pipe Fitter rate was shown to be on average $10.54 higher than the General Laborer hourly wage rate. Doubtless, increasing the wage rate by changing the classification for workers "employed by or on behalf of any public body engaged in public works," increases the costs to public bodies**C**a fact the Department does not deny

(it merely claims that an increase in the applicable Prevailing Wage "does not *directly* increase any cost of operation of political subdivisions"). (The Department's Suggestions in Support, p. 9 (emphasis added)). While the Department may claim it has always wanted higher Pipe Fitter wages to be paid on outdoor pipe projects, there is simply no dispute that General Laborers have generally performed the work *paid at General Laborer Wages*. See citations in Appellant=s Brief; see also, LF 219, Labor and Industrial Relations Commission Order of May 30, 1997; LF 222, Labor and Industrial Relations Commission Order of June 11, 1997 (Afact that workers within the jurisdiction of a laborers= union have traditionally installed pressured pipe" was insufficient to change Commission=s opinion of Asimilar work@); *Essex Contracting, Inc. v. City of DeSoto*, 815 S.W.2d 135, 138 (Mo. App. E.D. (1991)(rejecting imposition of higher Pipe Fitter wages and finding that "laborers in Jefferson County working on public works projects customarily installed ductile iron pipe."). While it makes no difference which union generally performs the work, the Department is not free to impose its

own view of the wage rate paid in disregard to the actual wage generally paid, regardless of the union affiliation.

The Department=s action violates the Prevailing Wage Act by directly increasing the costs of pressurized pipe projects to public entities and its taxpayers in disregard to the actual wage rate paid in the locality for such work. The action is based wholly on the Department=s view of what the wage should be Asimilar@ to rather than the actual wage that is paid. The fact that the Department has now increased the wage paid from that continued to be paid in the private sector is undeniable evidence that the language and purpose of the Act has been violated. LF 202**B**214. Rather than protecting public workers from being paid less than the workers Ain the locality@ -- the purpose of the Act -- the State now ignores the wages paid to workers private or public, and requires a wage rate that may not be paid in the locality to even one worker *performing that work*, let alone the majority of the hours worked on such outdoor pipe projects.

While the Department clearly is charged with determining the wages paid for Asimilar work,@ it may not ignore the actual

wages generally paid for identical work. The point was clearly made by this Court in *City of Joplin v. Industrial Commission of Mo.* 329 S.W.2d 687 (Mo. 1959), where the Court explained that the Aprevailing wage@ is Asynonymous with market rate.@ In *City of Joplin*, this Court affirmed the striking down of the Commission=s wage determination for outdoor sewer pipe work where the wage was based on Asimilar@ work on highways and construction of buildings, when there was abundant direct evidence that a lower wage was actually paid in the locality for Aidentical or like work@ work on Asewers , mains and submains.@ *Id*. at 695. The Court noted that Commission had failed to consider the Awages paid and the workmen used,@ and instead looked only at evidence that supported its own pre-determined Aannouncement@ that the higher rate classification it deemed Asimilar@ would govern. Rejecting the Commission=s disregard of the actual wages paid, the Court concluded that Awe cannot construe the Act to mean that the same or identical work is not to be considered in determining the wages and type of workmen to be used on such a project.@ *Id.* Here, the Department has once again attempted

to impose its own view of what should be paid in disregard to the undisputed evidence of the actual Awages paid and the workmen used.@

If the Rule merely codifies existing practices since 1957, then the Department=s current attempt to use it to change the actual wage rate paid is unlawful as the existing practice undisputedly requires General Laborer, not Pipe Fitter wages on outdoor Pipe Project. However, if the Rule is interpreted to change the prevailing wage rates paid since 1957, then the Rule as so interpreted violates the Article X, Section 21, Mo. Const. as amended and the Prevailing Wage Act by imposing a new mandated cost and by exceeding the Department=s authority to Aascertain@ the actual wages paid.

The Act requires reliance on the market rate paid in the locality **B** not rejection of it or bureaucratic attempts to change the wage practices that actually Aprevail@ in each area.

By combining unequivocally different work on outdoor pipe projects with traditional indoor plumbing work done by pipe fitters and plumbers, the Department has violated its statutory duty, and once again attempted to force a wage rate

higher than is actually paid in the locality. As such, the Department has exceed its authority and imposed substantial unilateral costs on local governments that violate both the Constitution and the Statute.

CONCLUSION

Based on the foregoing facts, arguments and authority, Missouri Rural Water Association, Missouri Municipal League, and City of Springfield respectfully urge this Court to vacate the trial court's decision and grant Appellants all other relief that it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Supreme Court Rule 55.03;

2. The brief complies with the limitations contained in Supreme Court Rule 84.06(b); and

3. According to the Word Count Function of counsel's word processing software, the brief contains 4,138 words.

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Carl S. Yendes

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2003, a copy of the foregoing was sent by United States Mail, postage pre-paid, to:

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